

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1350 OF 2014

Madhukar s/o Maruti Devsatwar,
Age 63 years, Occupation: Agri.,
R/o. Nalegaon, Ta. Chakur,
Dist. Latur.

...Petitioner

Versus

1. Vinayak s/o Maruti Devsatwar
Age: 61 years, Occ: Agri. & Contractorship,
R/o Nalegaon Ta.Chakur,
Dist. Latur.
2. Anil s/o Vinayak Devsatwar,
Age 37 years, Occ: Agri. & Business,
R/o. Nalegaon Tq. Chakur,
Dist. Latur.
3. Sunil s/o Vinayak Devsatwar,
Age 35 years, Occ: Agri. & Business,
R/o Nalegaon Ta. Chakur,
Dist. Latur.
4. Nagnath s/o Maruti Devsatwar,
Age 58 years, Occ: Agri. & Business,
R/o. Nalegaon Ta. Chakur,
Dist. Latur.

...Respondents

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Mr. Annasaheb S.Kadam, Advocate for the petitioner.
Mr. A.N.Kakade, Advocate for respondent nos. 1 to 3.

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CORAM: SUNIL P. DESHMUKH, J.

DATE : December 13th, 2017

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith.
2. Heard learned Counsel for the parties finally by consent.
3. Original Plaintiff - Petitioner before this Court, is aggrieved by order dated 7.12.2013 passed by Civil Judge, Junior Division, Chakur, whereunder, Exh.76 in RCS No.77/2005, filed by the present petitioner seeking permission to withdraw said suit with liberty to file the fresh suit, claiming his entitlement to certain portion of the land based on some factual aspects, preceding the institution of the suit, has been rejected.
4. The suit had been instituted in the year 2005, making certain averments in the plaint in regard to accretion and deletion in respect of land holding of plaintiff, and also subsequent events which, according to the plaintiff, were not correctly recorded, and averments appeared rather not in keeping with factual position under some misconception of the lawyer and, as such, after issues were framed, and before

evidence had been commenced, an application had been filed for amendment of plaint, making effort to bring to the fore correct position.

5. According to learned Counsel for the petitioner, the application for amendment had been rejected for all the erroneous reasons, and said rejection had hampered the interest of the plaintiff in the litigation, he had chosen recourse to withdraw the suit pursuant to Order XXIII of the Code of Civil Procedure, with liberty to file a fresh suit, as provided.

6. It appears to be a case of petitioner-plaintiff that he is entitled to land holding for 5 Hectare, 47 Are and a well, and same having not been depicted under the averments in the plaint, and as the attempt to seek amendment to the suit by an application under Order VI, Rule 17 of the Code, trying to make out his case, resulted in rejection, the suit as such being rendered incapable of carrying forward the purpose for which the litigation had been instituted by the petitioner. In the circumstances, petitioner had no alternative, but to seek recourse to Order XXIII of the Code under application - Exhibit 76, however, the same had also been rejected, and had met with failure for all erroneous reasons.

7. Learned Counsel for the petitioner submits that for almost the same reasons which went into rejection of earlier amendment application, present application - Exhibit 76 has been rejected. He submits that in the technical approach by the Court, the petitioner's quest for justice has taken a backseat and has been almost lost.

8. Learned Counsel for the respondents, however, contends that both the applications; earlier amendment application as well as application pursuant to Order XXIII of the Code, have been rejected for all right reasons. While amendment was being sought, the earlier litigation in respect of the well had not been referred to at all, and as such, the Court had considered the approach of the petitioner being not clean. He further submits that the defendants' defence, in the process, would have weakened in its efficacy if such an amendment to the suit would have been allowed. He submits that even the application moved for withdrawal of the suit seeking liberty to file a fresh suit would not be in consonance with the requirements under the Rules and Order XXIII of the Code. He submits that, as adjudged by the trial Court, it would not be said that the suit can be suffering from any formal defect, or it

may fail for reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit, or part of a claim.

9. Having regard to the arguments on either side, and on perusal of the impugned decision of the trial Court, it appears that the trial Court had been rather cursory in its approach since the order does not discuss at all as to what were the defects, and what were the deficiencies which had crept in, in the earlier averments in the plaint. In such a case, a Court should approach the matter, giving reasons while dealing with contentions advanced, wherein a person feels that his complete claim in litigation is not being represented, and the same is sought to be cured, either by amendment, or by withdrawal of suit with liberty to file a fresh suit.

10. In the present factual scenario, while the plaintiff claims a larger area to his entitlement along with a well, giving reasons therefor, and giving account of events, it does not appear that it has received its due while the applications were being considered. The Court appears to have been overwhelmed more by the technicalities since the deficiencies were not removed before the issues were framed, or for that

matter, the earlier litigation had not been referred to.

11. The matter, admittedly, is from mofussil area of a backward region. The petitioner, primarily, appears to be an agriculturist by occupation, and does not appear to have realized the mistakes occurring earlier. In the circumstances, while he had made attempts to rectify the deficiencies by application seeking amendment, and present application seeking withdrawal of suit, the technical blockades are undesirable to be raised which would defeat the very purpose for which he is making an approach to the Court. In the circumstances, the proper approach would be, if the Court considers that inconvenience is being caused to the other side, to mend it by imposing costs.

12. The impugned order is set aside. The Application Exh.76 in RCS No.77/2005 stands allowed with costs of Rs.2,500/-. The Writ Petition is allowed.

(SUNIL P. DESHMUKH)
JUDGE

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